



Illinois Department of Transportation

2300 South Dirksen Parkway / Springfield, Illinois / 62764

Subject:
Guidelines for Review
of Contract Claims

CONSTRUCTION MEMORANDUM NO. 02-71

Effective: May 31, 2002

Expires: Indefinite

This memorandum supersedes and replaces Construction Memorandum 94-71 dated May 15, 1994.

The purpose of this memorandum is to provide the Department's Resident Engineers, Supervising Field Engineers and District Construction Engineers with a uniform set of guidelines that may be used as a reference in dealing with claims made by Contractors on construction projects. Knowledge of the examples included in the guidelines, along with familiarity with the Contract documents, will assist Engineers when analyzing contract claims. Proper analysis of contract claims will preclude recommendations of settlements that exceed Departmental policies or it may establish potentially costly precedents.

1. General

The Department's philosophy in addressing construction contract claims is built on the foundation of equitable treatment for the Contractor and for the Department as owner. Several questions should be addressed before making recommendations or decisions on claim settlements.

a. Has the Contractor been damaged?

If the Contractor has not suffered a documented financial loss or delay resulting from circumstances or events related to the contract, compensation is generally not granted.

b. Is the amount of the damage claim fair?

The Contractor may not be awarded settlements that exceed documented actual expenses. Assumed loss of profits or pro rata overhead costs are generally not recognized. Once entitlement is recognized, real costs that are not precluded by contract terms may be considered.

c. Is the payment excluded under the contract terms?

The requirements set forth in the contract documents may exclude entitlement for excusable delays and/or compensable damages resulting from compliance with the provisions of the contract. Claims are generally not considered where excluded by "no damage" terms in the contract.

- d. Has the Contractor been asked to assume an unfair risk?

Occasionally "no damage" or exculpatory terms may be considered when the adverse or damaging conditions exceed those contemplated by the contract. It is prudent to consider what was contemplated by the contract when analyzing this type of claim.

- e. Would settlement establish an undesirable precedent?

Claims practices and procedures are based to a great degree on precedents established by past settlements. In analyzing claims, the impact a settlement may have in setting a precedent for future claims must be recognized in arriving at a recommendation. The risk of establishing a damaging precedent is greatly increased when commitments are made prior to claims settlement.

2. Types of Costs

The following are examples of costs which are typically claimed by contractors together with the Department's position as to whether such costs are compensable and if so to what extent. Entitlement must be established before any costs are considered compensable.

- a. Idled Equipment is equipment required for a work operation which is idled and cannot be used on other work due to a compensable delay caused by the Department.

This is an identifiable cost and the hours claimed for reimbursement for the idled equipment must be documented by the Resident Engineer for future reference. Payment for idled equipment will be made in accordance with Article 105.07. The Contractor has an obligation to minimize idled equipment expenses to the extent practical. Payment for removing the equipment from the project should be considered if it is more economical than keeping it idled on the jobsite.

- b. Idled Personnel is the labor force required for a work operation which is idled and cannot be used on other work due to a compensable delay caused by the Department.

This is a compensable cost which should be paid for in accordance with the Article 109.04(b)(1) and (2), without additives, for the time between the start of delay and the minimum remaining hours in the work shift required by the prevailing practice in the area.

Salaried employees of the Contractor who are idled may be paid for the duration of the delay depending on the nature of their occupation. For example, an idled paving superintendent and plant operator would be eligible for compensation. General superintendents, mechanics, and bookkeepers would not be paid for unless all progress on the contract is delayed. Payment will be considered only for those hours solely attributable to the contract for which complete documentation is provided.

- c. Increased Wage Rates and Material Costs are added costs which a Contractor incurs when a compensable delay causes work, which otherwise would have been completed, to be performed after labor and material costs have increased.

Such costs are compensable only to the extent that the delay actually impacted the work operation. For example, a contractor's paving operation is delayed for two weeks due to an act of the Department. During the two week period only seven working days are available because of rain. One week after resuming work the contractor is required to pay increased wage rates due to a new collective bargaining agreement. The contractor is entitled to compensation for the difference in wage rates for those workers included in the paving operation for a period of seven days only - not the entire remaining paving operation.

- d. Jobsite Overhead includes the cost of items such as salaried personnel, rental of office space, lease of plant and storage sites, telephones and utilities.

If a compensable delay affects a controlling item or the entire project such that the Contractor is required to remain at the project site for a longer duration, jobsite overhead may be considered to be compensable.

Each item of the jobsite overhead must be reviewed independently rather than accepting a daily or percentage rate. The cost of utilities will generally be directly related to the duration of use. However, rental or lease arrangements may be on a monthly, semi-annual or annual basis and not be affected by the delay. Salaried personnel who were compensated as "idled personnel" should not be included in jobsite overhead.

- e. Off-Site Overhead includes those costs which the Contractor incurs in operating a home office such as administrative salaries, amortization and maintenance of office space and equipment, telephone, utilities, accounting services, etc. These costs are relatively fixed and generally are not project specific.

Contractors frequently distribute their offsite overhead as a percentage of billings (claim amount) on the basis of some pro rata formula such as the Eickley formula and claim "unabsorbed overhead" due to a delay. Such principles, which were developed for claims settlement involving manufacturing plants, do not appear appropriate for highway construction work since it is seasonal in nature, is subject to "rain outs" and experience shows that contractors frequently do not work even though conditions are appropriate. Unabsorbed overhead would be compensable only if the delay was of inordinate duration and it can be documented that the delay resulted in lack of bonding capability or available prequalification which precluded the contractor from bidding on other work.

Other elements of offsite overhead will not be considered compensable unless it can be documented that the overhead amount increased solely because of a delay attributable to the particular contract in question.

- f. Loss of Efficiency is a reduction in labor or equipment productivity due to an act or omission of the Department. Such reductions in productivity must be documented to be compensable.

Assume that the Department failed to secure a parcel of right of way by the date stipulated in the contract. This omission increased the length of haul for the earth excavation operation and earth for embankment on the parcel was required to be stockpiled and moved again when the parcel was secured. The Contractor's productivity was clearly reduced and the additional costs may be compensable.

When a Contractor is delayed and is required to deviate from the progress schedule it may be claimed that the work efficiency "built into" the schedule is lost, resulting in added costs. Similarly when the Department decides to pay the premium portion of overtime rather than granting an extension of time, it may be claimed that work productivity declines due to the sustained work hours also resulting in added costs. Such added costs may be determined in accordance with the Department's policy on acceleration.

- g. Loss of Use of Money or Interest is a cost that reflects the time value of money.

If a Contractor incurs "out of pocket" costs he may claim that he was unable to invest funds equal to those costs in the marketplace or conversely was required to pay interest on money borrowed to meet those costs for the period from when the costs were incurred until the claim is settled.

Whether such claims have merit is a moot point. The Court of Claims has never awarded interest as there is no basis in the Mechanic's Lien Act for levying interest against the state. Such claims are therefore non-compensable.

- h. Loss of Anticipated Profit. Profit is the excess of returns over expenditures on a business venture.

The amount of profit that a contractor realizes on a project is dependent upon the profit factor included in the bid to remain competitive, actual productivity compared to planned productivity, weather, strikes increased material costs, etc.

If a contractor is required to perform added work beyond the original scope of the contract such work is paid for on the basis of contract bid prices, agreed prices or force account, each of which provides for a profit factor.

If a contractor incurs out of pocket costs in performing the original scope of work and is compensated for those costs, then the margin of profit on the original scope of work has not been diminished.

No allowance will be made for any loss of anticipated profit.

- i. Preparation of Claims is a cost incurred by a contractor in preparing and submitting a claim for additional compensation or time.

If a contractor desires to pursue additional compensation or time he should bear the cost of establishing entitlement and documenting associated costs. The Department also incurs costs as part of the claims settlement process in the form of review time, meetings, preparation of correspondence, and in some instances attorney and consultant fees.

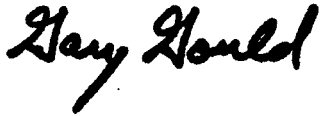
Cost for preparing claims are not considered compensable.

3. Processing

Claims for additional compensation that are supported by the District Engineer must be submitted to the Central Bureau of Construction together with the District's supportive recommendation as to entitlement. The recommendation of the local agency should also be submitted for claims on FAS and FAUS contracts awarded by the Department.

If the District and Central Bureau agree that entitlement has been established, the District will review the Contractor's records in accordance with the above guidelines and refer to Article 109.09 to verify the amount of entitlement due the Contractor. The District will then submit a supportive recommendation as to the amount of the proposed settlement to the Central Bureau.

Requests for extensions of time will be reviewed in accordance with Construction [Memorandum No. 28](#).

A handwritten signature in black ink that reads "Gary Gould". The signature is written in a cursive, slightly slanted style.

Gary Gould
Engineer of Construction